

**St. Francis Medical Center-West and Laborers' International Union of North America, Local 368, AFL-CIO, Petitioner. Case 37-RC-3712**

June 19, 1997

**DECISION AND DIRECTION**

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

The National Labor Relations Board has considered determinative challenges in an election held September 1, 1995, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 68 for and 67 against the Petitioner, with 2 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

We agree with the hearing officer, for the reasons set forth in her report, that the challenge to the ballot of Amy Olaen should be overruled. However, contrary to the hearing officer's recommendation, we find that the challenge to Production Leader Richard Saito's ballot should also be overruled.

The hearing officer found that Richard Saito was a supervisor within the meaning of Section 2(11) of the Act and recommended that the challenge to his ballot be sustained.<sup>1</sup> We disagree. For the reasons set forth below, we find merit in the Employer's contention that the hearing officer erred in failing to distinguish between Saito's duties when he substituted for his supervisor, who was on leave due to illness, and Saito's duties before and after that period of substitution.

The Employer is an acute care, nonprofit hospital facility with about 500 employees. The September 1995 election among its nonprofessional employees included employees in the Nutrition Services Department, which produces the meals for patients, employees, and visiting public. Hee Bong Hyun is department head for the entire Nutrition Services Department. The Department is composed of two sections—the clinical, or dietary section, which is responsible for preparing the patient menus, and the production side, where the food is prepared. There are approximately 30 employees on the production side. Martin Daguio, Nutrition Services supervisor, heads the production side and reports directly to Hyun.<sup>2</sup> Richard Saito is production leader on the

production side of the Department and reports to Daguio. Saito is an hourly employee who oversees the work of food and beverage production and service employees (cooks, tray service workers and leaders, and dishwashers), bakes once or twice a week, delivers items to and retrieves them from the storeroom, orders products from his office, and fills in wherever help is needed.

The hearing officer found, and we agree, that when Daguio was on a 5-month medical leave, from November 7, 1994, to April 7, 1995, Saito assumed his responsibilities and was given a 10-percent pay differential. During that period, Saito filled out employee evaluations, made effective recommendations on other evaluations, and evaluated at least one probationary employee with the recommendation that she pass probation. While substituting for Daguio, Saito administered discipline, including a written warning to employee Fe Nakamura. When Daguio returned to work in April 1995, Saito reverted to his regular pay scale and resumed his regular duties.<sup>3</sup>

The hearing officer found, and we agree, that while substituting for the absent Daguio, Saito exercised supervisory authority. Therefore, the first issue we must address is whether Saito is a supervisor within the meaning of Section 2(11) of the Act by virtue of his substituting for Daguio. "[T]he appropriate test for determining the status of employees who substitute for supervisors is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks." *Aladdin Hotel*, 270 NLRB 838, 840 (1984).

Although Saito substituted for Daguio for approximately 5 of the 10 months preceding the election, a substantial period of time, we find that his substitution was not "regular" within the meaning of the *Aladdin Hotel* test.<sup>4</sup> Saito's assumption of Daguio's duties was temporary, caused by extraordinary circumstances, and there is no evidence that it is likely to recur. See *Blue Island Newspaper Printing*, 273 NLRB 1709, 1710 (1985) (individual found not to be a supervisor when "substitutions occurred irregularly rather than on any scheduled basis"); compare *Honda of San Diego*, 254 NLRB 1248, 1249 (1981) (individual found to be a supervisor when his substitution for employer's manager "was not limited to . . . sporadic and irregular absences due to illness"). The record also indicates that

<sup>3</sup> Daguio initially returned on a part-time basis. In July or August 1995, he resumed working on a full-time basis but would leave early 3 days a week for dialysis treatments. Although Saito may have completed certain evaluations in the few weeks following Daguio's return in April 1995, this merely represented a completion of his earlier responsibilities as substitute supervisor.

<sup>4</sup> In this respect, *Laser Tool*, 320 NLRB 105, 108 (1995), relied on by the hearing officer, is distinguishable. In that case, the individual substituted for the absent supervisors "on a regular, ongoing basis," i.e., "generally at least once a week."

<sup>1</sup> The stipulated election agreement included the production leader. However, we agree with the hearing officer that if Saito were a statutory supervisor he would be excluded from the unit under Board law despite the agreement of the parties. E.g., *Rosehill Cemetery Assn.*, 262 NLRB 1289 (1982).

<sup>2</sup> Although the parties did not so stipulate, we agree with the hearing officer that it is clear that Hyun and Daguio are Sec. 2(11) supervisors.

Saito substituted for Daguio while he was on vacation in January 1992 and in April-May 1994, but we find that these occasions are too sporadic and limited to satisfy the *Aladdin Hotel* test. See *Jakel Motors*, 288 NLRB 730 (1988) ("The sporadic assumption of supervisory duties during annual vacation periods of regular supervisors is not sufficient to establish supervisory status."). Accordingly, we conclude that Saito is not a supervisor on the basis of his substituting for Daguio.

We now turn to the question whether Saito exercised supervisory authority after April 1995 when he returned to his regular duties as production leader. Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The burden of proving supervisory status is on the party who alleges that it exists. *California Beverage Co.*, 283 NLRB 328 (1987). The Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). "In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors, and not 'straw bosses, leadmen, set-up men and other minor supervisory employees.'" *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), *affd.* in relevant part 794 F.2d 527 (9th Cir. 1986). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. *Id.* at 1689.

Applying these principles to the facts of this case, we find insufficient evidence to warrant a finding that Saito's production leader duties involved the exercise of supervisory authority.

In making her recommendation, the hearing officer relied on evidence that Saito is the highest ranking employee present in the late afternoon and on Saturday, that he receives a higher hourly salary than the other production workers, and that he shares an office with Daguio. In addition, she relied on Saito's authority to authorize overtime in an emergency, on his suggestion to an ill employee that she take an additional day off to see a doctor, on an incident where Saito was asked to resolve a "squabble" between employees, and on two instances when Saito changed a schedule to grant an employee's request for time off.

We find that the foregoing, even if considered together, are insufficient to establish supervisory status. Although Saito is the highest ranking employee on site in the production area on Saturdays and in the late afternoon, there is no evidence that his direction of employees at those times is other than routine. We do not agree with the hearing officer's finding that this is a continuation of Saito's substituting as a supervisor. Rather, we find that at those times Saito is a lead person, an experienced employee who directs the work of other employees engaged in routine work.<sup>5</sup> Absence of other supervision is one of the secondary indicia which may be considered but which standing alone is insufficient to establish supervisory status. *Billows Electric Supply*, 311 NLRB 878 (1993). Saito's status as the highest person in charge is even less compelling because Daguio and Director of Nutrition Services Hee Bong Hyun are generally available if needed. *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 393 (1989), *enfd.* 933 F.2d 626 (8th Cir. 1991). Similarly, the fact that Daguio and Saito are the only two production employees who have their own office, and Saito's higher hourly salary, are at most secondary indicia which, in the absence of statutory supervisory indicia, are insufficient to establish supervisory status. *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994).

With respect to Saito's ability to authorize overtime, the hearing officer stated that "even Hyun admitted that Saito has independent authority to grant overtime in an emergency, and defined that rather broadly to include situations where the work must be completed because 'we have to feed the patients no matter what happens.'" The hearing officer also found that "in order for the production area to run efficiently, frequently immediate decisions must be made regarding whether to call in a replacement employee to work or to grant overtime." There is, however, no evidence that Saito possessed the authority to require an employee to work overtime or to require an off-duty employee to come to work to replace an absent employee. On the contrary, the record shows that the procedure is for Saito to request an employee to work overtime or to telephone one of the call-in employees named on a list maintained by the Employer and ask that individual to come to work, but the employees have the right to decline all such requests. In *Providence Hospital*, 320 NLRB 717, 732 (1996), the Board held that charge nurses were not supervisors where they could ask, but not require, an employee to come in to work or work overtime, finding that "[t]his limited authority requires only routine judgment."

The hearing officer also found that employees frequently call Saito to report off from work, and she specifically credited employee Bautista's testimony

<sup>5</sup> Even the hearing officer found that "the tray line and cooking work in the production area is routine."

that when she called Saito on one such occasion because of a back strain, he told her that she should stay home the following day, rest, and see the doctor. Bautista also testified, however, that in general when employees call in sick they are given the day off. Therefore, Saito's grant of permission to Bautista to stay home another day did not involve the exercise of independent judgment because she would, in any event, have had the right to take the extra time off if she so desired. Indeed, the hearing officer herself commented on the record that she was "having a hard time deciding why this [incident] is so relevant, the fact that [Saito] said to just go to a doctor. It sounds like it's pretty automatic to be granted a sick day if you call in sick."

The hearing officer further found that on two occasions Saito changed the schedule to grant employees vacation leave without first consulting with Daguio. With respect to one of these incidents, the record shows that Daguio was absent due to illness. Apparently for that reason, the hearing officer qualified her finding by stating that "*at least when substituting for Daguio*, Saito has the independent authority to approve employees' leave requests." (Emphasis added.) We have already found, however, that Saito is not a Section 2(11) supervisor by virtue of his substituting for Daguio (see our discussion above), and therefore do not rely on the incident that occurred during Daguio's illness. With respect to the single remaining incident, it is well established that the exercise of some purportedly "supervisory authority" in a sporadic manner does not confer true supervisory status. *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993).

Finally, the hearing officer found that employees go to Saito to resolve a problem at work, such as another employee not "pulling his load." This finding is apparently based on employee Gerald Tendal's testimony

that when he told Daguio about a problem with one of the cooks who was not helping out, Daguio told him to see Saito first. Saito told Tendal that "we" would look into it, and the situation eventually changed. This limited authority to resolve a "squabble" between employees does not warrant an inference that Saito has the statutory authority to adjust grievances, and it is insufficient to establish supervisory status. *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1077 (1985).

We conclude that the Petitioner has failed to meet its burden of showing that Saito exercises independent judgment in responsibly directing the work of other employees or in exercising any of the other statutory indicia of supervisory status. Such a showing of the use of independent judgment is essential to establish supervisory status. *Providence Hospital*, supra at 729.

In sum, Saito was not working as a supervisor in June when the petition was filed, or in September when the election was held, and it has not been shown that he substituted for a statutory supervisor on a "regular and substantial" basis. Thus, we find that Saito's community of interest with other unit employees has not been extinguished and, therefore, he was eligible to vote in the election. See *OHD Service Corp.*, 313 NLRB 901 (1994).

Accordingly, we overrule the challenges to the ballots of Amy Olaen and Richard Saito and shall direct that their ballots be opened and counted.

#### DIRECTION

IT IS DIRECTED that the Officer-in-Charge for Sub-region 37 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Amy Olaen and Richard Saito, serve on the parties a revised tally of ballots, and issue the appropriate certification.